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CHARLES ELMORE CROPLEY

No. 421

In the Supreme Court of the United States

OCTOBER TERM, 1951

DEAN ACHESON, AS SECRETARY OF STATE, APPELLANT

vs.

KIYOKUBO OKUKURA

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII

STATEMENT AS TO JURISDICTION

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII

Civil No. 1027

KIYOKURO OKIMURA

v.

DEAN ACHESON, AS SECRETARY OF STATE

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, defendant-appellant submits herewith his statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the decision and the judgment of the District Court entered in this cause.

OPINION BELOW

The opinion of the District Court is not yet reported. A copy of the decision, which includes the findings of fact and conclusions of law, as well as the opinion, is annexed hereto as Appendix A. A copy of the final judgment is annexed hereto as Appendix B.

JURISDICTION

The decision of the District Court was entered September 12, 1951, and a final judgment was entered October 11, 1951. A petition for appeal is presented to the District Court herewith, on October 11, 1951. The jurisdiction of the Supreme Court to review on direct appeal a decision or judgment holding an Act of Congress unconstitutional in a civil proceeding to which an officer of the United States is a party is conferred by 28 U.S.C. 1252 and 28 U.S.C. 2101(a). The following decisions sustain the jurisdiction of the Supreme Court to review the decision and judgment on direct appeal in this case. *Fleming* v. *Rhodes*, 331 U. S. 100; *United States* v. *Bekins*, 304 U. S. 27.

QUESTION PRESENTED

Whether Congress has the constitutional power to provide, as it has in Section 401(c) and (e) of the Nationality Act of 1940, that a person who is a national of the United States by birth shall lose his nationality by entering or serving in the armed forces of a foreign state, if he has or acquires the nationality of such foreign state, or by voting in a political election in a foreign state.

STATUTE INVOLVED

Section 401 of the Nationality Act of October 14, 1940, c. 876, 54 Stat. 1138, 1168, 8 U.S.C. 801, provides in pertinent part as follows:

> A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by:
>
> * * * * *

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(c) Entering, or serving in, the armed forces of a foreign state unless expressly authorized by the laws of the United States, if he has or acquires the nationality of such foreign state; or

* * * * *

(e) voting in a political election in a foreign state or participating in an election or plebiscite to determine the sovereignty over foreign territory; * * *

STATEMENT

The plaintiff-appellee filed in the District Court for the District of Hawaii a complaint under Section 503 of the Nationality Act (8 U.S.C. 903) seeking a judgment declaring him to be a citizen of the United States. After trial the District Court found the following facts:

Plaintiff was born in Hawaii in 1921 and was at birth a citizen of the United States and a subject of Japan. At the age of 4 he was taken to Japan for educational purposes and remained there until 1932 when he returned to the United States. In 1934 he again went to Japan. In 1943 he was inducted into the Japanese army and served until 1945. In 1947 he voted in a political election in Japan. In 1949 he applied for a United States passport which was refused on the ground that he had lost his United States citizenship.

The District Court held that Congress had no constitutional power to divest an American born citizen of his nationality because he served in a foreign army or voted in a foreign election. While conceding that "a native citizen may lose that status by naturalization in a foreign country if the American national complies with the formalities with a

specific, as distinguished from constructive, intention to cast off his United States citizenship," the court ruled that, as to persons who are United States citizens by birth, "the only means of divesting one's self of United States citizenship is by voluntarily undergoing in a foreign state a process comparable to our own naturalization procedure. Congress may not thus declare that by performing such and such an act, in or out of the United States, a citizen will become expatriated."

The District Court accordingly granted plaintiff's petition that he be declared a citizen of the United States.

THE QUESTION IS SUBSTANTIAL

The decision of the District Court, holding that Congress may not condition the loss of citizenship on the doing of an act, other than undergoing the formal process of naturalization in a foreign state, nullifies the considered judgment of Congress as to the conditions under which a citizen of the United States by birth may lose his American nationality. To a large extent it invalidates the whole pattern established for dealing with problems of dual nationality and dual allegiance since the reasoning of the District Court would necessarily affect, not only the particular clauses of the Nationality Act directly involved, but also all other clauses by which loss of nationality is made dependent on some act other than the process of naturalization.

The decision completely disregards the decisions of the Supreme Court which have implicitly or explicitly rejected the premises upon which the opinion rests. *Savorgnan* v. *United States*, 338

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U. S. 491; *Mackenzie* v. *Hare*, 239 U. S. 299; see also *Miranda* v. *Clark*, 180 F. 2d 257 (C.A. 9); *Ex parte Griffin*, 237 Fed. 445 (N.D.N.Y.).

The District Court holds that a citizen by birth can lose his nationality only by going through the formal process of naturalization in a foreign state. That position was, however, rejected by the Supreme Court in *Mackenzie* v. *Hare*, 239 U. S. 299, when it upheld the validity of Section 3 of the Act of 1907, providing that any American woman who married a foreigner should take the nationality of her husband. Referring to the absence of an express provision in the Constitution giving Congress the right to provide for loss of citizenship—a consideration relied upon by the District Court in the instant case—the Supreme Court said, in the *Mackenzie* case, at p. 311—

> But there may be powers implied, necessary or incidental to the expressed powers. As a government, the United States is invested with all the attributes of sovereignty. As it has the character of nationality it has the powers of nationality, especially those which concern its relations and intercourse with other countries.

The *Mackenzie* case also rejected the contention, implicit in the District Court opinion, that Congress cannot condition loss of nationality on any act other than one evincing a subjective intent to renounce American citizenship. Referring to the claim that "no act of the legislature can denationalize a citizen without his concurrence," the Supreme Court said, 239 U. S. at p. 312, "It may be conceded that a change of citizenship cannot be arbitrarily imposed, that is, imposed without the

concurrence of the citizen. The law in controversy does not have that feature. It deals with a condition voluntarily entered into, with notice of the consequences."

In *Savorgnan* v. *United States*, 338 U. S. 491, the Supreme Court pointed out, at p. 497, that "Traditionally the United States has supported the right of expatriation as a natural and inherent right of all people," and further, at p. 499, that "the acts upon which the statutes expressly condition the consent of our Government to the expatriation of its citizens are stated objectively. There is no suggestion in the statutory language that the effect of the specified overt acts, when voluntarily done, is conditioned upon the undisclosed intent of the person doing them." Nowhere in the opinion is there any intimation that the fixing of such objective conditions for loss of nationality is beyond the constitutional power of Congress.

In *Ex parte Griffin*, 237 Fed. 445 (N.D.N.Y.), where the act of expatriation relied on was the taking of an oath of foreign allegiance, the court, referring to Section 2 of the 1907 Act, said, at p. 453:

> Conceded that a sovereign cannot discharge a subject from his allegiance and arbitrarily deprive him of his citizenship against his consent, except as a punishment for crime, and that Congress cannot abridge or enlarge the rights of citizens * * *; still the right of a citizen to expatriate himself exists * * * and the sovereign power, through Congress, may declare that the doing of certain acts, inconsistent with citizenship in the United States, shall constitute expatriation—loss of or renunciation of citizenship.

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In *Miranda* v. *Clark*, 180 F. 2d 257 the United States Court of Appeals for the Ninth Circuit held that Section 401(e) of the Nationality Act of 1940, 8 U.S.C. 801(e), providing for loss of United States citizenship by voting in a political election in a foreign state, was constitutional. It ruled that the provisions of the statute "bind the courts unless it can be said that they are clearly unconstitutional, a conclusion without rational foundation."

We submit that the decision and judgment of the District Court are clearly erroneous. In fact, it is so contrary to the controlling decisions of the Supreme Court that we suggest that it may properly be reversed without argument.

Respectfully submitted,

HOWARD K. HODDICK,
United States Attorney,
Counsel for Defendant.

OCTOBER 11, 1951.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII

Civil No. 1027

KIYOKURO OKIMURA, PLAINTIFF

v.

DEAN ACHESON, AS SECRETARY OF STATE, DEFENDANT

DECISION

This is a Section 903, Title 8, United States Code suit seeking a declaration of United States citizenship.

FINDINGS OF FACT

I find the following as fact:

1. The plaintiff was born at Kauai, Hawaii, United States of America, in 1921.

2. At birth he became a United States citizen, and also a subject of Japan.

3. At age 4, plaintiff was taken to Japan for educational purposes, remaining there until 1932.

4. In 1934, plaintiff returned to Japan to further this Japanese education so that he might return to Hawaii and teach in a Japanese language school.

5. In 1934, plaintiff went to Japan, not upon a United States passport, but possessed only of a certificate of citizenship, Hawaiian Islands, issued by the United States Immigration Service pursuant to regulations.

6. At no time did plaintiff register in Japan as an American citizen with any United States consul.

7. In 1939, as some of his Middle School classmates who were United States citizens decided to return to the United States to avoid the Japanese Military Conscription law, plaintiff joined them, but had proceeded only as far as Kobe, Japan, when

his mother overtook him and compelled his return to school. In fulfillment of his parents' desires, plaintiff was graduated from Middle School, and thereafter attended, until mid 1942, Normal School.

8. At Middle School plaintiff was required to take an officer candidates' examination, and as he rated but a "B", due to his intentionally poor showing, he successfully avoided being rated as an officer candidate for the Japanese Army.

9. Up to 1942, the Japanese government paid one half of a student's tuition at Normal School; thereafter the government paid it in full.

10. Up to 1942, unless repaid, the government could compel a graduate to accept a teaching assignment; thereafter no such option existed, and plaintiff was ordered to and did teach at Niwa.

11. In Mid-June 1942, plaintiff received his notice to report for a Japanese Army physical examination.

12. Fearing the military police and that he would be shot or imprisoned, plaintiff reported for his physical. He, however, approached the colonel in command and asked to be excused as a United States citizen. This request infuriated the officer who slapped the plaintiff and called him an "ideological criminal."

13. Plaintiff passed his physical, and was classified 1-B.

14. Plaintiff was inducted into the Japanese Army in February 1943, seeing active service in China until captured in August 1945. He was returned to Japan in 1946. Prior to being separated from the Japanese Army, plaintiff had been promoted to the rank of sergeant.

15. When released, plaintiff returned to the parental residence in Japan, and thereafter resumed teaching school while awaiting further instructions when possible from his father who was, and had been during the war, in Hawaii.

16. In order to teach in postwar Japan, plaintiff had to be and was "cleared" by SCAP.

17. The war having blighted plaintiff's prospect of ever teaching in a Japanese language school in Hawaii, plaintiff took his father's advice and trained for a year to become a Buddhist priest.

18. In 1947, in Japan, plaintiff voted because General MacArthur had urged all to vote, and because he had heard that non-voters would lose their rice rations.

19. In 1949, being ready to return to Hawaii as a Buddhist priest, plaintiff applied for a United States passport. His application was denied on the ground that he lost his United States citizenship by serving in the Japanese Army.

Conclusion of Law

The plaintiff is entitled to the declaration of United States citizenship prayed for because Section 801(c) and (e) of Title 8, United States Code, is unconstitutional.

Opinion

1. Introduction

May Congress divest a native born citizen of his birthright?

This inquiry raises the question of the long assumed constitutionality of 8 U.S.C. Section 801(c) and (e), which reads as follows:

> "A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by:
>
> * * * * *
>
> "(c) Entering, or serving in, the armed forces of a foreign state unless expressly authorized by the laws of the United States, if he has or acquires the nationality of such foreign state; or
>
> * * * * *

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"(e) Voting in a political election in a foreign state or participating in an election or plebiscite to determine the sovereignty over foreign territory. * * *"

The point under discussion does not involve the unquestioned power of Congress to enact naturalization laws and to condition the retention of the status of citizenship so acquired. Over such matters Congress has plenary power under Art. 1, Section 8, Clause 4 of the Constitution:

"The Congress shall have power * * *
"To establish an uniform Rule of Naturalization * * *."

Too, it may be granted that a native citizen may lose that status by naturalization in a foreign country if the American national complies with the formalities with a specific, as distinguished from constructive, intention to cast off his United States citizenship.

Our concern is, rather, where in the Constitution is to be found any grant of power—specific or reasonably implied—by which Congress is authorized to divest an American born citizen of his nationality because, having also Japanese nationality, he served in the Japanese Army or voted in an election in Japan?

2. Birth: The Primary Legal Test of American Citizenship

The primary legal test by which United States citizenship is determined is place of birth. The test is a Constitutional one:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

—Amendment XIV, Section 1

It is the view of this Court that while the Constitution gives the Congress plenary power over citizenship by *naturalization*, it leaves the Congress no power whatsoever to interfere with American citizenship by *birth*.

The leading case on this subject is United States v. Wong Kim Ark, 169 U.S. 649 (1898). While some of its teachings seem to have been occasionally forgotten or whittled down in recent years, it has never been overruled.

The question there presented by the record was whether a child born in the United States, of parents of Chinese descent, who, at the time of his birth, were subjects of the Emperor of China, but had a permanent domicile and residence in the United States and were there carrying on business, and were not employed in any diplomatic or other official capacity under the Emperor, became at the time of his birth a citizen of the United States.

After an exhaustive review of the authorities, in the United States and abroad, the Supreme Court said:

> "There is, therefore, little ground for the theory that, at the time of the adoption of the Fourteenth Amendment of the Constitution of the United States, there was any settled and definite rule of international law, generally recognized by civilized nations, inconsistent with the ancient rule of citizenship by birth within the dominion." (Page 667)

To put beyond further argument the lack of Congressional power to take away American citizenship acquired by birth, the Court continued:

> "The Fourteenth Amendment, while it leaves the power, where it was before, in Congress, to regulate *naturalization*, has conferred no authority upon Congress to restrict the

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> effect of *birth*, declared by the Constitution *to constitute a sufficient and complete right to citizenship.*" (Emphasis supplied) (Page 703)

That principle has been followed to the present day. In Morrison v. California, 291 U.S. 82, 85 (1934), Mr. Justice Cardozo said, citing the Wong Kim Ark decision, supra:

> "A person of the Japanese race is a citizen of the United States if he was born within the United States."

And in Dos Reis v. Nicolls, 1 Cir., 161 F. 2d 860, 862 (1947), the Court said:

> "When Camara was born in Massachusetts in 1921, he then became an American citizen, not by gift of Congress, but by force of the Constitution of the United States (Fourteenth Amendment)," citing the Wong Kim Ark case, supra.*

3. The "Right" of Expatriation is not to be Converted into a Liability by Congressional Fiat.

Section 800 of Title 8, United States Code, deals eloquently with the "right" of expatriation, yet Section 801, applicable alike to native and naturalized citizens, attempts to spell out some ways in which that "right" may become a liability.

It is the holding of this Court that the only means of divesting one's self of United States citizenship is by voluntarily undergoing in a foreign

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* This Court is aware that there have been authoritative intimations to the contrary. See Mackenzie v. Hare, 239 U. S. 299, 311-312; Perkins v. Elg, 307 U.S. 325, 329; and Kawakita v. United States, 9 Cir., decided June 22, 1951. But only in the Mackenzie case was the precise Constitutional question here involved squarely presented, and there under vastly different facts.

state a process comparable to our own naturalization procedure.

Congress may not thus declare that by performing such and such an act, in or out of the United States, a citizen will become expatriated. Congress has been given control over only one means of *creating* United States citizenship, namely by naturalization. It has the power to create and to condition that grant of citizenship; but it is wholly devoid of any power to destroy citizenship by *birth*.

The contention that Congress may wipe out one's status as a United States citizen by declaring that the performance of such and such an act will result in expatriation can be reduced to an absurdity. Suppose, for example, that Congress instead of legislating as it has in Section 801(c) and (e), had simply declared that owning a gun, or voting in a school or a bond election in a foreign state was sufficient to effect a forfeiture of United States citizenship. Or, going a step further, suppose Congress were to say that attending a military parade, or a political rally in a foreign country would do the trick. Can United States citizenship be frittered away so easily?

And there is also another side to be considered. May the duties and responsibilities of United States citizenship be avoided by convenient expatriation under Section 801? See Kawakita v. United States, supra, and other recent treason cases where loss of citizenship was asserted as a defense.

United States citizenship may more easily be acquired than lost.

Stricter enforcement of the law of treason may well be the solution to the problem of dual citizens such as this, who selfishly play one country against the other.

4. Conclusion

It is the opinion of this Court that a native American citizen can be deprived of his birthright

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only if he undergoes some foreign procedure comparable to our system of naturalization.

The Constitution of the United States prescribes only two methods by which American citizenship can be acquired: by birth and by naturalization. I do not believe that Congress can specify means of losing that citizenship that are in no way related to the means of acquiring it.

Petition granted.

Dated: Honolulu, Territory of Hawaii, September 12, 1951.

(S.) J. FRANK MCLAUGHLIN,
United States District Judge.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII

Civil No. 1027

KIYOKURO OKIMURA, PLAINTIFF

v.

DEAN ACHESON, AS SECRETARY OF STATE, DEFENDANT

JUDGMENT

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII

Civil No. 1027

KIYOKURO OKIMURA, PLAINTIFF

v.

DEAN ACHESON, AS SECRETARY OF STATE, DEFENDANT

JUDGMENT

The above cause having come on regularly for trial on April 26 and 27, 1951, before the Honorable

J. Frank McLaughlin, Judge Presiding, without a jury, no jury having been requested, the plaintiff appearing by his attorneys, A. L. Wirin of Los Angeles, California, and Katsuro Hino of the law firm of Fong, Hino and Choy of Honolulu, and the defendant appearing by his attorney, Howard E. Hoddick, United States Attorney, and evidence having been introduced on behalf of the plaintiff and the defendant, and the Court having heard the arguments of counsel and being fully advised in the premises and having heretofore filed a decision in this matter which contains findings of fact and conclusions of law on September 12, 1951, now makes and enters the following:

JUDGMENT

The plaintiff is and has been at all times herein a citizen of the United States, and is herewith adjudged to be a citizen of the United States, with all the rights and privileges thereof.

Dated at Honolulu, T. H. this eleventh day of October, 1951.

(S.) J. FRANK MCLAUGHLIN,
Judge, United States District Court.

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